90-466

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID DOREMUS,

Petitioner,

-v-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI ON DECISION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID DOREMUS, PRO SE
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Canyon Country, CA 91350
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QUESTIONS PRESENTED

1. Whether an American citizen can be guilty of a criminal offense for the exercise of his statutory right.

2. Whether a Federal Judge's decision, subscribing a novel interpretation to a general executive branch regulation, inconsistant with empowering statute and the specific executive branch regulation and their legislative histories; in a case of first impression, effectively create retrospective imposition of criminal sanctions in violation of the due process clauses of the United States Constitution.

PARTIES TO THE PROCEEDING

Roirdon Doremus, co-defendant represented by Barry Marcus, Esq. and Wilbur Nelson, Esq., Boise, Idaho

David Doremus, pro se

Amicus, Western Mining Council represented by Robert Sanregret, Esq., Santa Ana, California

United States of America was Plaintiff in the criminal prosecution.

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IN THE

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment against David Doremus is reproduced in the Appendix at 1a-14a, and is reported at 888 F.2d 630. The U. S. District Court for the District of Idaho's decision is reported at 658 F. Supp. 752. The order of the United States Court of Appeals for the Ninth Circuit Court denying David Doremus' petition for re-

hearing, entered May 29, 1990 is reproduced in the Appendix at 15a. This order is not reported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion affirming the judgment against David Doremus on October 31, 1989. Petition for Rehearing was timely filed, with the United States Court of Appeals for the Ninth Circuit accepting the Petition and denying rehearing May 29, 1990. This dispositon implicated Constitutional questions and jurisdiction is granted for the Supreme Court to review the case through 28 USC Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

-- United States Constitution Article I, Section 1,

> "All legislative powers herein granted shall be vested in a Congress of the United States..."

- United States Constitution, Amendment V:

> "No person shall be...deprived life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

David Doremus and his brother, Roirdon Doremus owned valid unpatented mining claims in the Nez Perce National Forest, State of Idaho. Mining activities conducted on those claims in 1985 gave rise to the criminal prosecution tried below.

Congress long ago created a special place in our laws to encourage the prospecting, location and development of our domestic mineral resources [1]. After 83 years of serving our Nation well, Congress passed supplemental legislation, Multiple Use Surface Resource Act of 1955, reserv-

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(1) Mining Law 1872, "The locators of all mining locations...shall have the exclusive right of possession and enjoyment of the surface included within the lines of their locations..." 30 USC Sec 26

ing to the United States the surface resources on mining claims that are not being used by the miner in furtherance of his claim,

> "Provided however, that any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations... Except to the extent required for the mining claimants prospecting, mining or processing operations and use reasonable incident thereto...or to provide clearance for such operations... no claimant of any mining claim... shall... sever, remove, or use any vegetative or other surface resources." 30 USC Sec 612. Emphasis Added.

Thus, by direct grant from Congress I am authorized a grant to use all surface resources on my claim reasonably incidental to my mining operation. My authority is co-existant and equal with the USFS authorization to manage those surface resources not incidental to my mining operations. The very Act of Congress

authorizing the USFS to manage surface resources proscribes the Government not to "endanger or materially interfere" with my mining activities, 30 USC Sec 612. I am only prohibited from using those surface resources not reasonably incidental to my mining operation[2].

I am charged with removing $20.20 worth of trees (which were atop my vein being exposed) and for exceeding my Operating Plan by having open more than 11 trenches at one time thereby violating 36

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(2) The passage of the 1955 Multiple Purpose Resource Act did not strip any of my statute rights. The law was enacted in response to abuses of the mining laws where claims were located for purposes other than mining, such as recreational cabins, fishing and hunting sites, cafes, or for timber, grazing and water rights.

> "In short, this subsection recognizes essential rights-mining claims can, in the future, be used for activities related to prospecting, mining, processing and related activities, though not for unreleated activities...This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying long standing essential rights springing from location of a mining claim." H. R. Rep. 730, 84th Congress, 1st Secs. 2 U.S. Code Cong. & Ad. News, pp2474, 2478 (1955) Emphasis Added

CFR Sec 261 which (a) prohibits damaging trees and (k) prohibits violating the provisions of an approved Plan. But, that very regulation of my conviction has a caveat, specifically designed to protect miners' rights granted by separate and co-equal Federal statutes.

> "(b) Nothing in this part shall preclude activities as authorized by...the U. S. Mining Laws Act of 1872..." 36 CFR 261(b).

REASONS FOR GRANTING THE WRIT

The lower courts have placed too much emphasis on the Operating Plan as it being the holy grail. Yet, the USFS' own regulations pertaining to mining implemented after public review and input, are contained in 36 CFR Sec 228. The mining community relied upon the word of the USFS that they would respect miners' statutory rights and abide by their own regulations. In this case the USFS have broken their promise and sought successfully to have

the courts enforce general forest non mining regulations while ignoring the specific regulation promulgated to regulate mining.

Those knowledgeable with mining know that it is impossible to write an Operating Plan that covers all potentialities. Accordingly, the specific mineral regulation 36 CFR Section 228 allows for modification and field deviations. The USFS routinely passes out copies of Part 228. From the USFS I received, read and relied on it. Part 228 makes it clear that deviation from the Plan can occur if it is not a significant surface resource disturbance or alternatively even if the deviation is causing significant disturbance then the non compliance section provides:

> "(b) If an operator fails to comply with the regulations or his approved plan of operations and the non compliance is unnecessarily or unrea-

> sonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of non compliance upon the operator or his agent in person or by certified mail. Such notice shall describe the non compliance and shall specify the action to comply." 36 CFR Sec 228.7(b), Emphasis Added.

This language is clearly to provide for miners statutory rights and needs.

I am authorized by direct grants from Congress to cause mining necessitated injury and damage to surface resources. A miner must dig a hole through the surface resources to recover the mineral ore. Only by causing damage to surface resources can mineral exploration and development occur. I was invited by the Congress of the United States to come dig the holes I dug and Congress gave me an exemption from criminal prosecution if my damage to the surface resources are reasonably incidental to my mining activities.

It is clear that if my activities are authorized by the U.S. Mining Laws of 1872, or if I am not causing unnecessary or unreasonable damage to the surface resources, I am not prohibited by Part 261 and I could not be criminally prosecuted for such activities, or if my activities are unnecessary or unreasonable, I will be afforded the opportunity to remedy. The Circuit Court of Appeals brushed aside the clear language of part 228 stating that:

> "Part 228 does not contain any independent enforcement provisions."

This is contrary to the United States Supreme Court decision wherein the Court held the United States has available a number of civil remedies to prevent damage, misuse or theft of its surface resources,

> "Use and (or) occupancy of the public lands without right subjects the trespasser to liability to the United States for damages," Utah Power & Light Co., v. United States

243 US 389 (1917).

I am led to believe that I can deviate from my approved Plan or the caveat for conducting non-approved activities would not be in the USFS regulation. Following the Circuit Court of Appeals reasoning: a) if it is not specifically allowed, it is disallowed and b) only that which is allowed in the Plan is "reasonable"[3]. It follows, therefore that any violation of the Plan is unreasonable. Why would the Government's own regulations provide that the Plan can be deviated from if not to allow reasonable mining necessitated adjustments?

The Circuit Court of Appeal's Order makes it sound like I have wanton disregard for Government regulations and the environment. The truth is until you com-

(3) "The Operating Plan itself becomes the determination of what is reasonable conduct", US v Doremus 658 F. Supp.752

mence discovery you do not know where the vein will take you. The record shows the road we alledgedly constructed was merely walking our equipment to the intended point of excavation for which we were not charged. The few trees removed were for opening the discovery holes on our ore vein and our Plan of Operations specifically authorized us to leave the clear cut and enter the heavily forested area of our claim. Contrary to the Federal Appeal Court decision interpreting that the Plan to say we had to "confine" our activities to the clear cut area an inspection of the Operating Plan will reveal the Plan actually said "concentrate."

Since we had a geologist standing by at $35 per hour to examine our trenches as they were opened, we kept opening our trenches to obtain samples. Had we not been ordered to stop by the US Forest

Service, within a week of opening the excess holes (which we were authorized to dig, just not keep open) the excess holes would have been closed. The USFS unilaterally wrote the Operating Plan after discarding our submission. When the Plan was foisted on us, we were told we had to sign the Plan or be arrested or criminally prosecuted if we continued our exploration activities. The USFS stated their concern was that excess trenches would be left open during the winter months thereby endangering snowmobiles or animals. Unrefuted testimony from our geologist was that it was reasonable mining practice to keep the trenches open until after assay results were returned.

Maintaining open trenches while actively exploring is customary and reasonable mining practice. The USFS policy manual provides,

> "Forest officers should provide bona fide prospectors and miners reasonable, alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they may carry out necessary mineral associated activities without violation of laws and regulations." FSM Title 2814.

What has been ignored throughout this ordeal is the purpose of the USFS regulations and whether the Congressional intent is being accomplished. The intent is to protect the forest from unreasonable and unnecessary mining activities without circumscribing or derogating miner activities [4]. Congress has made it clear that the grant of the mineral, mining claim and

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(4) "We believe that the important interests involved here were intended to and can co-exist. The Secretary of Agriculture has been given the responsibility and the power to maintain and protect our national forests and land therein. While prospecting, locating and developing of mineral resources of the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissably encroach upon the right to the use and enjoyment of placer claims for mining purposes." U.S. v. Weiss 642 F.2d 296. (9th Cir 1981)

its resources is a reward and inducement for active, diligent exploration and development[5]. The 1955 statute authorizing the Government to administer surface resource says it cannot be done in such a way as to endanger or materially interfere with my reasonable mining activities[4]. I am granted the right to remove trees incidental to my operation and the USFS mining specific regulations (36 CFR 228) prescribe a system whereby I may deviate from my approved Plan provided it is not causing significant resource disturbance and if it is, I must be apprised of the non

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(5) "On each claim...not less than $100 worth of labor shall be performed on improvements made during each year." 30 USC 28. In 1872 $100 was a substantial amount of effort. Today, the USFS, wishes to minimize all surface impacts and restrain the miner from doing any more than the minimum necessary to hold the claim, as in the instant case. I did not request 11 holes maximum (which is less than one exploration hole per 10 acres) I requested active exploration of a twenty acre area. I was told by the USFS if I wanted to do any work at all, I must sign the plan the USFS unilaterally foisted on me.

compliance and afforded the opportunity to correct.

Would not a reasonable person believe that the Part 228 regulations appear to authorize deviations from the approved Plan and even if they were unreasonably (which mine were not unreasonable) be afforded opportunity to remedy the situation without being criminally prosecuted. This is not addressed by the Circuit Court of Appeals. The U.S. Governmental Agencies are bound to obey their own regulations.

Where is my Notice, that my reliance on the statutes, case law and even the mining regulations (36 CFR 228), that my actions constituted criminal actions.

This is what actually happened:

1. Without regard to the scope of the non compliance ($20 worth of trees and keeping open 30 holes for a few days) the

government orders immediate ceasation of all my activities (I was fully bonded for reclaimation) and commences criminal prosecution.

2. Without notice, the USFS enters upon my claims and destroys all my development activity (even my required and authorized eleven discovery holes)[6].

3. The U. S. Magistrate without regard to the enabling statutes says you violated a regulation, you are guilty.

4. The Federal appeal Judge says yes, the statute is over riding and I've got a right to conduct "reasonable" activities. but nowhere is reasonable defined so if agency says it's unreasonable, it must be so. Please remember that miners digging holes and uprooting trees is the

(6) FSH 2814.21, "The Forest Service must respect claims and claimants' property by using precautions to avoid damage to claim corner markers, excavations and other mining improvements and equipment."

antithesis of good forestry management. Yet the Judge is leaving it to a forester to determine if my actions are reasonable?[7].

5. The Circuit Court of Appeals say they agree with me that the law cannot be administered so as to materially interfere or endanger my operation but just because: my operation was summarily ordered stopped; the government came on my land and destroyed all my work (emergency rehabilitation); my operation remained under sus-

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(7) The 8th Circuit has ruled that the meaning of reasonable is that which is "reasonably necessary in the legitimate operation of mining" contrary to the 9th Circuit Court of Appeals decision in this instant case.

> "Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, <u>except so far as it may be reasonably necessary in the legitimate operation of mining.</u>" Teller vs. United States 113 Fed 273 (8th Cir. 1901)

pension for three years; I have expended over $40,000 in professional fees to obtain limited permission to resume my exploration; I have spent over $60,000 in criminal litigation legal fees[8]; my brother (my mining partner) has forever given up mining (litigation too stressful) and I was criminally prosecuted and am now a convicted criminal; All this the Circuit Court of Appeals says in no way endangers or interferes with my mining operation -- it is just the normal bureau-

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(8) This was a concern expressed during Congressional hearings,

> "A major concern expressed by the mining industry, and noted by the Public Lands Subcommittee of the House Committee on Interior and Insular Affairs, is the possibility of unreasonable enforcement of the regulations with resulting cost increases that could make otherwise viable mineral operations prohibitively expensive. The Forest Service recognizes that prospectors and miners have a statutory right not mere privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production. Exercise of that right may not be unreasonably restricted." Federal Register Vol. 39 No. 168 Wednesday, August 28, 1974, Emphasis Added

cractic process.

If I haven't YET been interfered with, when does the government's actions start to endanger and interfere with my mining activities?

I was virtually the last producing hard rock miner in the Nez Perce Forest and to my knowledge, I am now the last[9]. Once the USFS eliminates me, there is nobody else left to endanger.

NATIONAL PRIORITY

America desperately needs our domestic mineral production. America is the largest debtor nation in the history of mankind. In 1988 America imported $5.5 billion of gold. America should have been a

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(9) In the 1860's the Nez Perce Forest (Idaho County, Idaho) was the second largest gold producing region in the United States, at the turn of the century there were over 10,000 people in the area actively involved in mining. My tale is not unique, in every forest in America the independent miner is being frustrated, refused permission and prosecuted into extinction, we call it the "Revolving Door" -- yes, you have the right to mine, you just can't get there from here.

net exporter.

In 1986 U. S. raw material production fell over $1 billion while mineral imports surged nearly $2 billion. Considering only the 72 mineral and metal commodities for which fairly complete data is available, the U.S. is 100% import-reliant for 13 (about 18.1% of the total). Of the remainder, the nation is over 90% reliant upon foreign sources for 19 metals and minerals (26.4%) and over 60% reliant for 33 (45.8%). Some of the most significant of these mineral materials, and the approximate percentage of U.S. import reliance for each, includes the following: Antimony, over 60%; arsenic; 100%; Bismuth, 80%; cesium, 100%; corundum, 100%; diamond, 100%; fluorspar, 88%; gallium, 90%; gem stones, 100%; rubidium, 100%; thallium, 100%; and yttrium, 100%. (Source U.S. Bureau of Minerals).

America needs to actively develop our domestic mineral reserves. The obstruction of mining by U. S. Agencies is especially disturbing when you consider that less than 3/10's of 1% of all of America's land have even been impacted by mining [10]

If Congress does not want me to claim and develop the mineral resources on public lands, all it has to do is say so and I will immediately obey. Congress has said please mine our public lands, our Country needs the minerals. I came onto Public Lands to mine at the invitation of the Congress of the United States and I have never done anything but reasonable mining related activities on my claims. My only crime, if there is one, is my inability to secure "proper paperwork" from a Government Agency that doesn't want

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(10) National Material and Minerals Program Plan and Report to Congress April 5, 1982 from President Ronald Reagan

me in <u>their</u> forest.

Congress' most recent pronouncement, the 1980 National Material and Mining Policy Act, 30 USC 21(a) has declared it is the continuing policy of the Federal Government to foster private industry mining and mineral exploration as a National Security Priority. Congress also recognizes that needless destruction of our surface resources might occur through indiscriminate and unnecessary mining activities and has tried to set up a system whereby miners give the USFS notice of their intentions so the USFS can make recommendations on how we might accomplish our necessary work without unnecessarily or unreasonably damaging surface resources (mitigation). The USFS has abused this authorization to reasonably regulate (to the USFS the best mitigation is extremely limited or no activity) and circumscribed

my right to reasonably mine to the point my rights are obliterated.

I concede that I am required to obtain an Approved Operating Plan. However, both the approval of the Plan and the administration of that Plan by the USFS must be reasonable. The USFS' own Policy manual so provides [11].

I am not a permissive user of Forest. I have a statute right to be there equal to and co-existant with the USFS right to protect our national forests, and I am authorized to conduct reasonable mining activities independent of the USFS Operating Plan approval process.

As a reasonably intelligent person, I believe the Constitution of the United

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(11) "Forest officers should provide... reasonable... exploration methods... and operating plan provisions..." FSM 2814.24

"The willingness of the majority of prospectors and miners to comply with regulations, reasonably administered, is a principal key..."FSM 2817.03 Policy

States when it delegates to Congress the right to pass all laws. I attempted to abide by those laws. I am now being told that I must anticipate the possibility that a Circuit Court of Appeals might elevate a minor executive agency regulation superior to statute law. No matter how you dress an executive agency regulation it can't pre-empt Congressional statute. As a result of my doing my reasonable mining activities, which the Circuit Court of Appeals agrees is my statutory right, I will forever be branded a convicted criminal. If Congress is to pass all laws, how can I be criminally guilty for the exercise of a right Congress has granted to me?

Whether it be by retroactive passage of law or the Circuit Court of Appeals creating NEW interpretation of the existing regulations the effect is the

same. I have been convicted retroactively in violation of due process.

CONCLUSION

I believe the Operation Plan explicitly implied that I was allowed to remove trees and I retain an unrelinquished statutory right to do so.

I was convicted for violating a clause of the Plan that required me to "confine" my operations to the clear cut area. When I pointed out to the Circuit Court of Appeals that the language read, "concentrate' one of the three judges' opening remarks at oral arguments was that I was correct and "clearly I was not guilty on that count." If a Federal Judge sees it so "clearly" in court and apparently later reversed himself in the Decision, how can a lay person be held criminally guilty for believing he had a clear right to remove $20 worth of trees that sat atop his ore

vein in light of not only my implied operation plan authorization to damage trees but also in light of my express statute right and previous case law interpretation authorizing those actions.

I do not feel that the United States Constitution envisioned a scheme whereby an executive agency rule can strip my statutory right. Nor, do I believe that my reasonable reliance on Federal Statutes be used to my detriment for my criminal conviction as a reasonable doubt exists as to the application of those statutes, with what used to be clearly worded regulations, which now by case interpretation, appear to be conflicting regulations.

If my conviction is allowed to stand, it's effect will be that miners will have no remaining statutory rights as those rights can only be exercised by permission of an executive branch agency. Only the

largest of companies could then afford the protracted processing and administrative appeal and litigation required to obtain permission to explore a prospect of unknown value. I profer that this ultimate result will be the final economic impediment to independent prospectors and many of our future great discoveries will not be made[8].

The Circuit Court of Appeals has reversed the Constitutional scheme where an American can go about his business exercising all his rights (FREEDOM) and should he do something contrary to law, the Government may prosecute him. Now the Court is telling us that miners are a special class of Americans who must first litigate and prove to the Courts that their contemplated actions are reasonable and therefore legal before they may exercise their statutory rights (TOTALI-

TARIANISM). If this decision is allowed to stand, who shall we single out next, maybe dog owners?

I request that my Writ be approved and my brother and my convictions overturned and that this Court send a clear message to the USFS that domestic development is a high national priority and that miners have a statutory right which must be respected. Please tell the Government agencies that they have a duty and obligation to respect miners' statutory rights and must promptly provide miners with reasonable Operating Plan provisions and then reasonably administer those Plans.

Respectfully Submitted this 26th day of July, 1990.

DAVID DOREMUS

SPECIAL EARTHQUAKE NOTICE

This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RORY DOREMUS and DAVID DOREMUS, *Defendants-Appellants.*	No. 87-3831 D.C. No. MISC-3025-HLR OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
July 12, 1988—Seattle, Washington

Filed October 31, 1989

Before: Cecil F. Poole, William C. Canby, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Mines and Minerals

Affirming the district court's judgment of conviction, the court held that the requirement of prior approval does not endanger or materially interfere with mining operations.

Appellant brothers Rory and David Doremus have staked mining claims in the Nez Perce National Forest in Idaho, and since 1972, have conducted mining operations under operating plans approved by the Forest Service. In 1985, the operating plan at issue was executed by Rory Doremus and the District Ranger for the Red River Ranger District. Between July 23 and July 31, 1985, Forest Service representatives visited the site and observed more than 30 open trenches criss-crossing more than 1¼ acres. Several trees had been pushed over, and a road constructed through the trees. Violation notices were issued, and appellants were tried before a federal magistrate. The magistrate issued a memorandum opinion denying appellants' motion to dismiss and finding them guilty beyond a reasonable doubt. The district court affirmed their convictions.

[1] Appellants contended that their activities were authorized by statute, 36 C.F.R. § 261.1(b) (1987), and that therefore the regulations do not prohibit such activities. [2] The court rejected appellants' argument that the effect of this regulation is to exempt mining operations from the general prohibitions of Part 261, thereby limiting the regulation of mining operations to 36 C.F.R. Part 228. Part 228 does not contain any independent enforcements, providing only that an operator be given a notice of non-compliance and an opportunity to correct the problem. [3] Appellants argued also that even if Part 261 applies to them, the Forest Service is barred from prohibiting any conduct that was reasonably incident to their mining operation. The district court held

that the operating plan itself becomes the definition of what is reasonable conduct and therefore any violation of the operating plan was per se unreasonable under the statute. The district court also held that the regulations did not conflict with 30 U.S.C. § 612 because the regulatory right is limited so as not to endanger or materially interfere with mining operations. [4] The court agreed with the district court that the regulation is consistent with the mining laws. The regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between the important interests involved here which were intended to and can co-exist.

[5] Appellants' claim that the operating plan is ambiguous is without merit. The plan is not only not vague, but is defined with numerical precision. No reasonable person could construe the plan as allowing more than 30 trenches to be open simultaneously. [6] Section 612 does not authorize mining operators to act without Forest Service approval, and the operating plan did not authorize the cutting of live trees. It does not give appellants a blanket license to remove live trees in any manner and quantity they believe to be reasonable. The court concluded that section 261.9(a) is not unconstitutionally vague as applied.

OPINION

POOLE, Circuit Judge:

Appellants Rory and David Doremus were convicted of violating United States Forest Service regulations which prohibit "[d]amaging any natural feature or other property of the United States" (36 C.F.R. § 261.9(a) (1987)) and "[v]iolating any term or condition of . . . [an] approved operating plan" (36 C.F.R. § 261.10(k) (1987)). On appeal, appellants contend that their activity was permissible as "reasonably incident" to

their mining operation (*see* 30 U.S.C. § 612 (1982)) and that the regulations are unconstitutionally vague. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellants are brothers who have staked mining claims in the Red River Ranger District of the Nez Perce National Forest in central Idaho. Since 1972, appellants have conducted mining operations on these claims under operating plans approved by the Forest Service.

On May 13, 1985, the operating plan at issue was executed by Rory Doremus and Jerry Dombrovske, District Ranger for the Red River Ranger District. Paragraph IV of the plan provides that "[t]he area of exploration will be concentrated to the clear cut," and that "[n]o more than five trenches will be open at one time." The magistrate found that the latter provision was proposed by the appellants. The plan also prohibited the cutting of live, green trees for firewood and provided that "[i]f timber is needed operator is asked to cut small dead timber." The plan neither expressly authorized nor expressly prohibited the removal of live trees in conducting the mining operation.

Between July 23 and July 31, 1985, Forest Service representatives visited the site and observed more than 30 open trenches, some larger than 10 feet by 30 feet, crisscrossing more than 1¼ acres.[1] Several trees has been pushed over, and a road had been constructed through the trees on one side of the claim. Violation notices were issued, and appellants were tried before a federal magistrate on March 14, 1986. On June 18, 1986, the magistrate issued a memorandum opinion denying the Doremuses' motion to dismiss and finding them guilty beyond a reasonable doubt. The Doremuses appealed

[1]According to the testimony of a Forest Service officer, at least one of the trenches was dug after appellants were issued a notice of non-compliance and ordered to shut down on July 26.

to the district court, which affirmed their convictions. *United States v. Doremus*, 658 F.Supp. 752 (D.Idaho 1987).

STANDARD OF REVIEW

The questions presented involve the construction of federal law and its application to essentially undisputed facts, and therefore they are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201-02 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The factual findings of the magistrate will not be overturned unless they are clearly erroneous. *United States v. Nance*, 666 F.2d 353, 356 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982).

DISCUSSION

I. STATUTORY CHALLENGES

A. *Applicability of Regulations*

[1] Appellants' first argument is that they are exempted from the prohibitions of 36 C.F.R. Part 261 by the proviso which states:

> Nothing in this part shall preclude activities as authorized by . . . the U.S. Mining Laws Act of 1872 as amended.

36 C.F.R. § 261.1(b) (1987). Appellants contend that their activities were authorized by statute and that therefore the regulations do not prohibit such activities.

Appellants' statutory rights derive from the provision in the 1872 Act which reserves to the claimant "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26 (1982). This right was limited by the Surface Resources and Multiple Use Act of 1955, which reserved to the United States the right

to manage and dispose of surface resources on unpatented mining claims; however, the 1955 Act provides that such use shall not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b) (1982). The same statute also prohibits the removal of vegetative surface resources "[e]xcept to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, . . . or to provide clearance for such operations or uses." 30 U.S.C. § 612(c).

[2] Appellants argue that the effect of 36 C.F.R. § 261.1(b) is to exempt mining operations from the general prohibitions of Part 261, thereby limiting the regulation of mining operations to 36 C.F.R. Part 228. We reject this argument. Part 228 does not contain any independent enforcement provisions; it only provides that an operator must be given a notice of noncompliance and an opportunity to correct the problem. 36 C.F.R. § 228.7(b) (1987). The references to operating plans in § 261.10 would be meaningless unless Part 261 were construed to apply to mining operations, since that is the only conduct for which operating plans are required under Part 228. In addition, 16 U.S.C. § 478 (1982), which authorizes entry into national forests for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," specifically states that "[s]uch persons must comply with the rules and regulations covering such national forests." This statutory caveat encompasses all rules and regulations, not just those (such as Part 228) which apply exclusively to mining claimants. In this context, § 261.1(b) is merely a recognition that mining operations "may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

B. *Validity of Regulations*

[3] Next, appellants argue that even if Part 261 applies to them, the Forest Service is barred by 30 U.S.C. § 612 from

prohibiting any conduct unless it proves that the conduct was not "reasonably incident" to their mining operation. The district court rejected this argument, holding that "the operating plan itself becomes the definition of what is reasonable and significant conduct under the circumstances," and that therefore any violation of the operating plan was *per se* unreasonable under the statute. 658 F.Supp. at 755. The district court also held that the regulations did not conflict with 30 U.S.C. § 612 because "th[e] regulatory right is limited so as not to endanger or materially interfere with mining operations." *Id.* at 756, *citing United States v. Richardson,* 599 F.2d 290 (9th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980).

[4] We agree with the district court that 36 C.F.R. § 261.10(k) is consistent with the mining laws. The regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between "the important interests involved here [which] were intended to and can coexist." *Weiss,* 642 F.2d at 299. The purpose of requiring prior approval is to resolve disputes concerning the statutory balance *before* operations are begun, not after. If the appellants were unsatisfied with the conditions of the plan, they could have appealed to the Regional Forester under 36 C.F.R. § 228.14 (1987). His decision would then be subject to review under the Administrative Procedure Act. *See* 5 U.S.C. §§ 701 *et seq.* (1982); *cf. Sabin v. Butz,* 515 F.2d 1061, 1065 (10th Cir. 1975) (recognizing jurisdiction under APA to review denial of special use permit). David Doremus admitted in his opening brief that appellants recognized that an appeal was a possible course of action and deliberately chose to forego it. David Doremus' Opening Brief at 23.[2] Having failed to

[2]David Doremus also contends that appellants attempted on several occasions to appeal Forest Service decisions concerning their plan. The record shows only that appellants sent two letters of complaint to Ron Gardner, a Forest Service official. One of the letters (dated January 18,

appeal the plan, appellants may not now complain that the restriction limiting appellants to five open trenches was "unreasonable." *See United States v. Brunskill*, 792 F.2d 938, 941 (9th Cir. 1986) (refusing to consider merits of operating plan where defendants did not appeal rejection of proposed plan); *cf. United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1286 (9th Cir. 1980) (enjoining claimant from prohibiting public recreational use on his claim; noting that claimant could protest to federal agency and, if unsatisfied, bring lawsuit).

We also agree that 36 C.F.R. § 261.9(a) does not conflict with the mining laws. This provision is subject to § 261.1(b), which incorporates appellants' statutory rights under 30 U.S.C. § 612. However, although appellants have a right to dispose of vegetative resources where such disposal is "reasonably incident" to their mining operation, they may not exercise that right without first obtaining approval of their operation in the manner specified in 36 C.F.R. Part 228. If appellants believed that their operation required the removal of trees and that the plan failed to accomodate that need, their remedy was to appeal the plan prior to commencing operations. Appellants may not blithely ignore Forest Service regulations and argue afterward that their conduct was "reasonable."

Appellants argue, however, that *Richardson* holds that the government must show that their conduct was unreasonable in order to prohibit it. We disagree. In *Richardson*, the government filed a civil action to enjoin the Richardsons from

1985) was sent prior to the violations complained of, and although the subsequent letter characterized the January 18 letter as an "appeal" and "demanded" that it be processed, nothing in the original letter indicated that it constituted an appeal, and the Forest Service did not treat it as one. If appellants were dissatisfied with the Forest Service's response, they could have filed an action to compel the Service to process the appeal. *See* 5 U.S.C. § 706(1) (1982).

blasting and bulldozing on their mining claims and to require restoration of the surface. The court specifically noted that although "the Secretary of Agriculture has ... authority under sections 478 and 551 of Title 16 to promulgate regulations concerning the methods of prospecting and mining in national forests; ... [n]o such regulations were in effect before this lawsuit was commenced." 599 F.2d at 292. In the absence of any regulatory guidance, the court looked directly to 30 U.S.C. § 612 to determine whether the Richardsons' activities were "reasonably incident" to their mining operation. Thus, *Richardson* held that the Forest Service could enjoin unreasonable mining operations even in the absence of specific regulations. *Richardson* did not hold that the Service could not enforce a reasonable regulatory scheme requiring mining operators to receive prior approval before beginning work.

We conclude that the requirement of prior approval does not "endanger or materially interfere with" appellants' mining operations, and that the regulations at issue are therefore consistent with 30 U.S.C. § 612.[3]

II. CONSTITUTIONAL CHALLENGE

A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984). "The threshold question in any vagueness

[3]Appellants other claims are wholly without merit. First, the magistrate's finding that no oral amendments to the plan were made in 1985, except for an authorization to remove one tree, is not clearly erroneous. Second, the Forest Service Manual merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority. Finally, neither the jury trial nor the separation of powers issues were raised below, and we will not consider them for the first time on appeal. *Scott v. Pacific Maritime Ass'n*, 695 F.2d 1199, 1203 (9th Cir. 1983).

challenge is whether to scrutinize the statute for intolerable vagueness on its face or whether to do so only as the statute is applied in the particular case." *Id.* at 1346.

Where the statute or regulation does not implicate constitutionally protected conduct, a facial challenge will succeed "only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). In such a case, "[a] plaintiff who engages in some conduct which is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* at 495; *see also id.* at 500 ("Flipside's facial challenge fails *because* . . . the ordinance is sufficiently clear *as applied* to Flipside."), (emphasis added).

In this case, it is clear that no constitutionally protected conduct is implicated, nor is the statute so vague as to specify "no standard of conduct at all." *See United States v. Westbrook*, 817 F.2d 529, 531-32 (9th Cir. 1987); *Schwartzmiller*, 752 F.2d at 1348. Therefore, we need only consider whether the regulations are vague as applied. *United States v. Hogue*, 752 F.2d 1503, 1504 (9th Cir. 1985).

A. *36 C.F.R. § 261.10(k)*

[5] This regulation prohibits "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan." Appellants' claim that the operating plan is ambiguous is without merit. Paragraph IV-A of the plan provides:

> No more than five trenches will be open at one time. However, if a test trench is found to contain mineral value it may be left open to use as a discovery pit.

> Only one discovery pit per claim will be left open at a time. Discovery pits are excluded as trenches.

The meaning of this provision is crystal clear. The plan, which covers all operations pertaining to six listed claims, imposes an overall limit of five open trenches for the entire area of exploration. It also allows one open discovery pit (not counted as a trench) for each of the six claims. The provision is not only not vague, it is defined with numerical precision. No reasonable person could construe the plan as allowing more than thirty trenches open simultaneously.

Again, however, appellants rely on 36 C.F.R. § 261.1(b), which states that "[n]othing in this part shall preclude activities as authorized by . . . the U.S. Mining Laws Act of 1872 as amended." Their contention is that a reasonable person of ordinary intelligence would have believed that he could exceed the operating plan so long as his work was "reasonably incident" to his mining claim. Appellants also rely on 36 C.F.R. § 228.7, which states that a notice of non-compliance will be issued "[i]f an operator fails to comply with . . . his approved plan of operations *and* the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources" (emphasis added). From this, appellants argue that the regulations contemplate conduct which is not in compliance with the operating plan but which is also not unnecessary or unreasonable.

In *Hoffman Estates*, the Supreme Court listed a number of factors which affect the degree of vagueness which the Constitution tolerates. 455 U.S. at 498-99. First, economic regulation is subject to a less strict vagueness test, because its subject matter is often more narrow and because businesses can be expected to consult relevant legislation in advance of action. The court added that "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* at 498. Second, a stricter vagueness test applies where criminal

penalties are involved. Indeed, although the licensing regulation in *Hoffman* only imposed civil penalties, the court treated it as "quasi-criminal" because of its prohibitory and stigmatizing effect. *Id.* at 499-500 & n.16. Third, a scienter requirement may mitigate vagueness, especially with respect to the adequacy of notice to the complainant. Fourth, a more stringent test is applied when the law threatens to inhibit the exercise of constitutionally protected rights.

Analyzing § 261.10(k) in light of these factors, we conclude that it is not unconstitutionally vague. Although the regulation imposes criminal penalties, in effect it acts as an economic regulation governing the conduct of mining operations on National Forest lands. As with an economic regulation, the subject matter is narrow, and mining operators are not only expected, but required, to obtain advance approval. Thus, the Doremuses had "the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to the adminstrative process." *Hoffman Estates*, 455 U.S. at 498; *cf. Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 49 (1966) ("we think it plain under our decisions that . . . the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality."). This ability greatly mitigates the strict liability nature of the offense. Finally, no constitutionally protected rights are implicated in this case. We therefore hold that § 261.10(k) is not unconstitutionally vague as applied.[4]

[4]Appellants also contend that the regulation invites arbitrary and discriminatory enforcement because "[t]he prohibited conduct is defined only in the operating plan, which may be unilaterally imposed upon Defendants by the district ranger." Rory Doremus' Opening Brief at 43. We reject this contention. The conditions of the operating plan are subject to negotiation, and the claimant may appeal any decision regarding the plan to the Regional Forester and, if necessary, seek judicial review.

The *amici* contend that the regulations are invalid under *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). It is true that the Court in *Yick Wo* strongly suggested that the ordinances involved there were invalid on their face because they conferred unrestrained discretion to deny a permit. 118 U.S. at 366. However, the Court explicitly chose not to rely on this ground, relying instead on the fact that the ordinance was discriminatorily applied on the basis of race. *Id.* at 373-74. There is no suggestion that such is the case here.

B. *36 C.F.R. § 261.9(a)*

This regulation prohibits "[d]amaging any natural feature or other property of the United States." "Damaging" is defined as "to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill or in any way harm or disturb." 36 C.F.R. § 261.2.

Appellants argue that the definition of "damaging" invites arbitrary and discriminatory enforcement because any entry into a national forest will "disturb" some natural feature. For the reasons outlined above, we decline to address this "facial" argument. As stated by the district court, "[c]ertainly, damage is inflicted when a live tree is destroyed by being pushed over." 658 F.Supp. at 758.

[6] The district court found it equally clear that "live green trees are a feature of nature." *Id.* We agree. Appellants argue, however, that the district court failed to consider the effect of a companion regulation, 36 C.F.R. § 261.6(a), which prohibits "[c]utting or otherwise damaging any timber, tree or other forest product, *except* as authorized by a special use authorization, timber sale contract, or Federal law or regulation" (emphasis added). We see no inconsistency. § 261.6(a) merely makes explicit the proviso in § 261.1(b), which excepts all activity authorized by Federal law. The flaw in appellant's argument is that 30 U.S.C. § 612 does not authorize mining operators to act without Forest Service approval, and the operating plan did not authorize the cutting of live trees. The plan addresses only small amounts of timber needed for the mining operation; it does not give appellants a blanket license to remove live trees in any manner and quantity which they believe to be reasonable. We therefore conclude that § 261.9(a) is not unconstitutionally vague as applied.

III. CONCLUSION

In summary, we hold that the regulations at issue are consistent with the statutory scheme and are not unconstitution-

ally vague. Appellants' convictions are therefore AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RORY DOREMUS and DAVID DOREMUS, Defendants-Appellants.	No. 87-3831 D.C. No. MISC-3025-HLR O R D E R

BEFORE: POOLE, CANBY AND LEAVY,

CIRCUIT JUDGES.

The motion for additional time to file petition for rehearing filed by appellant RORY DOREMUS is ordered filed.

The petitions for rehearing are DENIED.

David Doremus
26251 Ravenhill Road
Canyon Country, CA 91350
Telephone: (805) 252-3106
In Propria Personna

IN THE UNITED STATES DISTRICT

COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, -vs- DAVID DOREMUS, Appellant.	No. 87-3831 PETITION FOR REHEARING

COMES NOW, David Doremus who requests that the Entry of Judgement be set aside and a new hearing be ordered due to the following laws and constitutional rights which were not addressed by the Panel in their opinion.

VAGUENESS ON PRIORITY OF STATUTE OVER REGULATION

The central issue to my appeal is, "How can I be criminally guilty for exercise of a statutory right." I am entitled, 30 USC 612, to operate my mine in a reasonable manner and it was proved at trial the mining activities were reasonable mining practices.

The vagueness challenge has little to do with interpretation of "humerical precision" of the number of holes open, which the Panel did address. The vagueness issue raised in my Brief was regarding the apparent contradictions between Federal Statute explicitly authorizing my removal of trees:

> "The Locators of all mining locations made on any mineral vein ...shall have the exclusive right of possession and enjoyment of all the surface included within the lines of the locations..." 30 USC Sec 26

This exclusive use was modidifed in 1955 to reserve to the government to manage those surface resources not reasonably incidental to my mining operation:

> "Rights under any mining claim ...shall be subject...to the right of the government to manage and dispose of vegetative surface resources...except to the extent required for the mining claimants mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses..." 30 USC 612 Emphasis Added

Regulation 36 CFR 261 says I cannot violate an approved Plan yet, Part 261.6(a) excepts "nothing in this part shall preclude activities as authorized by... the U.S. Mining Laws of 1872 as amended."

The circuit courts have upheld my right to use timber when necessary for my operations:

> "Possession of a mining claim, in accordance with the provisions of

> the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, <u>except so far as it may be reasonably necessary in the legitimate operation of mining</u>." Teller v. United States, 113 Fed 273 (8th Cir. 1901) and the Federal Court of Idaho has also upheld my right to dispose of timber,
>
> "It is then declared that the locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,...This right has been extended to the use of the sufficient timber upon the claim for development purposes, and includes the use of timber for fuel and what is necessary for shafts, tunnels, and the construction of buildings as may be necessary as an adjunct to such development." US v. Deasy, 24 F2d 108 (Idaho 1928)

I still do not believe that "executive branch" regulation can supersede Congressional Statute no matter how you dress the regulation. I am required by statute to perform annual onsite diligent exploration for minerals as the primary

condition for retaining ownership of my claim:

> "on each claim...not less than $100 worth of labor shall be performed on improvements made during each year." 30 USC 28

The United States Supreme Court has held,

> "that the basic Federal requirements, the staking, and the assessment work are acts relating to the ground itself and to create some condition which could be observed by persons seeking to locate claims in the same area..." 400 US 48 (1979)

The Panel chose to ignore the issue of how I can have fair Notice of my actions constituting a criminal offense when every statute and prior case law appears to authorize my activities if they be reasonable mining practices. Only a narrow reading of a minor regulation purports to have made my actions illegal and then only be leaving it up to the Operating Plan to determine what is reasonable.

Where is my Notice that my reliance upon statute and case law makes me crimi-

nally liable for violation of a regulation?

VAGUENESS OF CONFLICTING REGULATIONS

While the Panel discusses the enforcement powers of 36 CFR 261, they say that I:

> "may not exercise that (statutory) right without first obtaining approval of their operation in the manner specified in 36 CFR Part 228."

No analysis of the inter-relationship of Part 228 is provided. As a reasonably intelligent person and I read Part 228:

> "If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources, the authorized officer shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail." 36 CFR 228.7(b)

I am led to believe that I can deviate from my approved Plan or the caveat for conducting non-approved activities would not be in the regulation. Following the Panel's reasoning: 1) if it is not

specifically allowed, it is disallowed and 2) only that which is allowed in the Plan is "reasonable"[1]. It follows, therefore that any violation of the Plan is unreasonable. Why would the Government's own regulations provide that the Plan can be deviated from if not to allow reasonable mining necessitated adjustments.

Further, 36 CFR 228.7 provides that upon Notice, I can correct the problem within thirty days of Notice if what I am doing is unreasonable. The government did not obey its own regulation. I was ordered to stop in my tracks. If the Notice had said cover up ten to twenty trenches and continue, I could easily have complied. I felt then, as I do now, that the Operating Plan is a guideline and as

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(1) "The Operating Plan itself becomes the definition of what is reasonable and significant conduct under the circumstances." Panel Decision Page 13097.

discovery work progresses, minor deviations will be necessary. There was no limitation expressed or implied as to how many holes I could have dug and in negotiating the Plan, the concern of the US Forest Service was how many holes would be left open during the winter shut down.

The Panel's Order makes it sound like I have wanton disregard for Government regulations and the environment. The truth is until you commence discovery you do not know where the vein will take you. The record shows that road we constructed was merely walking our equipment to the intended point of excavation. The few trees removed were for opening the discovery holes and our Plan of Operations specifically authorized us to leave the clear cut and enter the heavily forested area of our claim. Since we had a geologist standing by at $35 per hour, we kept

opening our trenches to obtain samples and had we not been ordered to stop by the US Forest Service, within a week of opening the excess holes - (which we were authorized to dig, just not keep open) the excess holes would have been closed. Was this unreasonable mining practice?

Would not a reasonable person believe that the Part 228 regulations appear to authorize deviations from the approved Plan and even if they were unreasonably (which mine were not unreasonable) be afforded opportunity to remedy the situation without being criminally prosecuted. This is not addressed by the Panel.

Again, where is my Notice that my reliance on the statutes, case law and even the mining regulations (36 CFR 228) that my actions constituted criminal actions.

STATUTE RIGHT TO REMOVE TREES NEVER WAIVED

The Panel mentions that the Plan did not specifically authorize removal of trees but did not address my superior and unrelinquished statute right that authorizes their removal:

> "...Any severance or removal of timber which is permitted under the exceptions of the preceeding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management." 30 USC 612(c), Emphasis Added

The very statute that empowers the government to manage the surface resources on my mining claim 30 USC 612 excepts from the government management my right of:

> "removal of timber (for mining) uses reasonable incident thereto," 30 USC 612(c)

Nowhere does the court find that the $20 worth of trees I removed were not "reasonable incident" to my mining activi-

ties.

The statute reads that for clearing trees, for which I am convicted, I do not need permission since I still retain exclusive use and enjoyment of the trees by direct grant from the U. S. Congress. The Panel DID NOT FIND the trees were not "reasonably incident to my operation." The trees are mine to use and sever provided the trees are incidental and reasonable to my operation. It was only $20 worth of trees!

I am not a permissive user of the Forest. I have a statute right to be there and to conduct reasonable mining activities.

As a reasonably intelligent person, I believe the Constitution of the United States when it says, "Congress shall pass all laws" and I attempted to abide by those laws. I am being told, without even

any consideration of this central issue, that I must anticipate the possibility that a 9th Circuit Panel might elevate a minor executive agency regulation superior to statute law and as a result of my exercising my reasonable mining activities, which the Panel agrees is a statutory right, I will forever be branded a convicted criminal.

Effectively, the 9th Circuit has expost facto created NEW interpretation of the existing statutes and then retroactively convicted me.

The only mention of vagueness dealt with by the Panel is their conclusion that there appears no vagueness within the Operating Plan as to how many holes could be open at one time. Even the Panel's ruling concurred that I have the right to mine in a reasonable manner. They now attempt to define reasonable mining prac-

tices as that which the US Forest Service says is reasonable. Where is my Notice to what my conduct should have been in order for me to avoid criminal conviction for exercise of a statutory right? I apparently did not properly, (as now currently defined) obtain prior permission to exercise my statutory right.

ARBITRARY & CAPRICIOUS

The Panel gave no consideration to the fact that I was the last producing miner left in the largest forest in the Continental United States. The Nez Perce was the largest gold producing region in the U. S. at the turn of the century and today through legal and bureaucratic impediments imposed by the US Forest Service, NO gold is being produced in the Nez Perce Forest. At what point do U.S. Forest Service regulation and oppression endanger and materially interfere with legitimate

mining activities?

A statute or regulation may equally fall afoul of the "void for vagueness" principle if it invites "arbitrary and discriminatory enforcement," Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Circuit 1984). This Court has stated:

> "A statute may be struck down for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, Papachristau v.City of Jacksonville, 405 U.S. 1156, 162 ..., or if it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, citing, Giaco v. PA, 382, U.S. 399, 402-03, 86 S.Ct. 518, 520-21, 515 L.Ed.2d 447 (1966)." United States v. Dacus, 634 F.2d 441, 444 (9th Cir. 1980)

Surely the regulations can also be struck down for the same reason. A conflict exists between these two separate 9th Circuit decisions and the Panel chose to not address arbitrary and capricious

act by the government.

I am, as a miner, explicitly authorized by statute to remove timber.

The Panel on Page 13096 mentions the exception to the right of the government to manage the surface resources, yet does not find that my uses were not for clearance. The trees were reasonably incidental to my mining operation.

How can anyone reading this statute not believe that I am authorized to cut a few trees? My right to cut a few trees necessary to my operation is not a permissive use, it is a statutory right!

I can understand how the panel would like to see an orderly administration of our public lands, but their desire to have me litigate <u>before</u> I exercise my statutory right is a circumscription of my statute right.

CONFLICT WITH CIRCUIT RULINGS

A criminal conviction of a violation of an executive branch regulation while ignoring the intent of that statutory authorization is a constitutional violation according Congress the right to pass all laws. The Panel says since this separation of powers issue was not raised below, it is barred. The Constitution is always at issue and I request rehearing.

The passage of the 1955 Multiple Purpose Resource Act did not strip any of my rights and as reported in H.R. Rep. 730, 84th Congress, 1st Secs. 2U.S. Code Cong. & Ad. News, pp 2474, 2478 (1955). The law was enacted in response to abuses of the mining laws where claims were located for purposes other than mining, such as recreational cabins, fishing and hunting sites, cafes, or for timber, grazing and water rights.

The specific stated intent of this statute was for the government reclaiming use of surface resources on mining claims not being used for mining and to prevent non-mining uses on mining claims. The Act did give the government the authority to prevent reasonable mining operations.

Recently in United States v. Curtis-Nevada Mines, Inc. The Court held that,

> "The claimant thus had the present and exclusive possession for the purpose of mining, but the Federal Government retained fee title and could protect the land and surface resources from trespass, waste or from uses other than those associated with mining. 611 F2d 1277 (9th Cir 1980)

Thus, the 9th Circuit has previously ruled the government may manage those surface resources not reasonably incidental to mining contrary to the Panel's decision which effectively says it may also manage those resources which are reasonably incidental to mining.

In an 8th Circuit ruling, the Court held in interpreting what rights a claimant has held:

> "Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining." Teller vs. United States Supra, Emphasis Added

Thus, the 8th Circuit has ruled that the meaning of reasonable is that which is "necessary in the legitimate operation of mining," contrary to the Panel's definition, Page 13093 which says,

> "that the operating plan itself becomes the definition of what is reasonable conduct..."

The Panel looked to criminal enforcement Provisions of 36 CFR 261 on the basis that Part 228 does not contain any inde-

pendent enforcement provisions. This is contrary to the United States Supreme Court decision wherein the Court held the United States has available a number of civil remedies to prevent damage, misuse or theft of to its surface resources on mining claims,

> "Use and (or) occupancy of the public lands without right subjects the trespasser to liability to the United States for damages," Utah Power & Light Co., v. United States 243 US 389 (1917)

The Supreme Court Decision was reaffirmed by the 9th Circuit in United States v. Langendorf, 322 F2d 25 (9th Cir 1963)

TRIAL BY JURY

In both lower courts I objected to my counsel that I was not being allowed a jury trial. I had separate lawyers for the lower court trial and appeal and each of my lawyers insisted that the 9th Circuit had previously ruled a petty misdemeanor did not get a trial by jury and

that it was up to the 9th Circuit to alter that Decision.

Arriving at the 9th Circuit and raising my objection, I am told by the Panel that their rule is that because I didn't raise my objection before, I am barred from raising it now. I wasn't even allowed to speak in court much less raise an objection. I am now representing myself so I can have a voice. I believe that my constitutional rights are always at issue.

I was charged with two misdemeanors arising from the same act which means I could have been sentenced to one year in jail and fined $1,000. The 9th Circuit's precedential ruling limiting the maximum sentence to six months and $500 is in conflict with the U.S. v. Potvin (1973, CA 10 Colo) 481 F2d 380, 26 ARL Fed 732 which held that a defendant's view of two misde-

meanors carrying six months each for offenses arising out of the same act was no less serious than a potential penalty of one year imprisonment.

Irrespective of the 9th Circuit $500 maximum, I was ordered to pay $640 which no matter what it is called (fine or restitution) is above the $500 threshold for consideration as a petty offense 18 USCS Sec. 1(3).

Irrespective of the fine, the US Forest Service came upon my mining claims and destroyed $5,000 of my reasonable mining exploration work and stopped my reasonable mining activities for over two years by refusing to approve any Operation Plan. This type of oppressive and dictatorial government actions is why I am constitutionally guaranteed a jury trial. In a case where a petty misdemeanor conviction can be used by the government to

disrupt and destroy a man's chosen business occupation by closing his business; costs me over $100,000 in direct and incidental legal expense; causes my business partner and his wife to withdraw forever from the business; and costs me $640 in fines; this is not the same category as petty misdemeanor for a speeding violation to be paid and then go on your way. This is exactly the abuse of patriots' rights that the Constitution was supposed to protect against by allowing citizens to weigh and determine guilt. Allowing the government exclusive domain to pass and enforce criminal laws without allowing the people to decide guilt is unconstitutional.

Then, for the Panel to acknowledge my statutory right that:

> "Provided however, that any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not

> to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 USC 612 Emphasis Added

and then say that I have not been endangered or materially interfered with (I was criminally prosecuted) is an insult to my intelligence.

Whether my mining venture has been endangered or materially interfered with, is a threshold issue. This threshold issue should have been decided by a jury. The Panel can't sweep away my constitutional right to a jury trial when the outcome of the Decision can destroy my business and I am without recourse for over two years lost income because I cut $20 worth of trees which I have exclusive right to use and whose cutting should have been approved in the Plan of Operations if the US Forest Service thought it such a big issue.

CONCLUSION

The Panel did not address the vagueness of my reliance upon Federal Statute over executive agency regulation, the vagueness of conflicting regulation and dismissed consideration of my constitutional rights to jury trial and separation of powers.

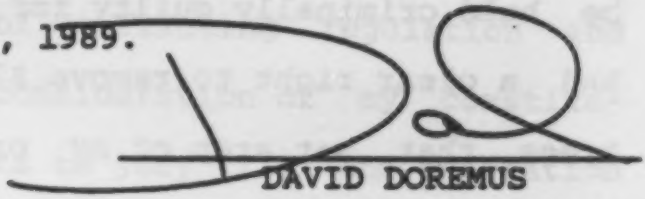
The Panel's decision makes it appear I have wanton disregard for the Operating Plan and the laws and regulations of our Country. The truth is that I believe the Operation Plan explicitly implied that I was allowed to remove trees. I was convicted for violating a clause of the Plan that required me to "confine" my operations to the clear cut area when I pointed out to the Panel in my Brief that the language read, "concentrate", one of the three judge's opening remarks at oral arguments was that I was correct and

"clearly I was not guilty on that count." If a Federal Judge sees it so "clearly" in court and apparently later reversed himself in the Decision, how can a lay person be held criminally guilty for believing I had a clear right to remove $20 worth of trees that sat atop of my ore vein in light of not only my implied operation plan authorization to damage trees but also in light of my statute right and previous case law interpretation authorizing my actions.

I do not feel that the United States Constitution envisioned a scheme whereby an executive agency rule can strip my statutory right any more than the 9th Circuit can pass a rule that strips me of my constitutional rights. Nor, do I believe that my reasonable reliance on Federal Statutes be used as the basis for my criminal conviction as a reasonable

doubt exists as to the application of those statutes with seemingly conflicting regulations.

Respectfully submitted this 5th day of December, 1989.



DAVID DOREMUS

Nos. 90-453 and 90-466

In the Supreme Court of the United States

OCTOBER TERM, 1990

RORY DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of petitioners for violating Forest Service regulations in the course of mining their unpatented claims on federal lands violated their rights under federal mining statutes or the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 888 F.2d 630.[1] The opinion of the district

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[1] "Pet. App." refers to the appendix to the petition in No. 90-453.

court (Pet. App. 80a-111a) is reported at 658 F. Supp. 752. The magistrate's opinion, Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. The petitions for rehearing were denied on May 29, 1990. Pet. App. 30a. The petition for a writ of certiorari was filed on July 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial before a United States magistrate, petitioners, who are brothers engaged in prospecting on unpatented mining claims, were convicted of damaging natural features on national forest service land, in violation of 36 C.F.R. 261.9(a),[2] and of deviating from their mine operating plan, in violation of 36 C.F.R. 261.10(k).[3] Each defendant was ordered to pay $500 in restitution, $90 in fines, and $50 in court costs. Pet. App. 32a. The district court and the court of appeals upheld both convictions.

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[2] 36 C.F.R. 261.9(a) provides in part as follows:

> The following are prohibited:
>
> (a) Damaging any natural feature or other property of the United States.

36 C.F.R. 261.2 defines "damaging" as "to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill, or in any way harm or disturb."

[3] 36 C.F.R. 261.10(k) provides in part as follows:

> The following are prohibited:
>
> * * * * *
>
> (k) Violating any term or condition of a special use authorization, contract or approved operating plan.

1. The surface effects of operations on unpatented mining claims in the national forests are subject to regulation by the Forest Service of the Department of Agriculture. The Act of June 4, 1897, ch. 2, 30 Stat. 35, codified at 16 U.S.C. 478 (known as the Organic Administration Act of 1897), authorizes entry into national forests for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to "rules and regulations" promulgated by the Secretary of Agriculture.[4] See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 582 (1987).

In 1955, Congress amended the Act of May 10, 1872, ch. 152, § 1, 17 Stat. 91, codified at 30 U.S.C. 22 *et seq.* (known as the Mining Act of 1872), by enacting Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, codified at 30 U.S.C. 611-615 (known as the Multiple Surface Use Act of 1955). Section 3 clarified the general right of entry for mining activity in national forests by providing for "conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands." H. R. Rep. No. 730, 84th Cong., 1st Sess. 8 (1955). Congress expressly reserved the federal government's right "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)" on unpatented mining claims located after July 23, 1955. 30 U.S.C. 612(b); see also *United States* v. *Richardson*, 599 F.2d 290, 293-295 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). The 1955 Act further provides that no use of the surface resources

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[4] The Organic Administration Act originally delegated authority over the national forests to the Secretary of the Interior. In 1905, that authority was transferred to the Secretary of Agriculture. Act of Feb. 1, 1905, § 1, 33 Stat. 628, 16 U.S.C. 472.

by the government or its permittees may "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." See 30 U.S.C. 612(b); see also Section 612(c) (permitting severance or clearance of timber if "reasonably incident" to mining operations).[5]

2. In 1977, the Secretary of Agriculture promulgated regulations governing public use of land administered by the Forest Service. See 36 C.F.R. Pt. 261. The regulations include prohibitions against "[d]amaging any natural feature or other property of the United States," 36 C.F.R. 261.9(a), and against "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan," 36 C.F.R. 261.10(k). Violation of one of the prohibitions in Part 261 is punishable by a fine of up to $500, imprisonment for up to six months, or both. 16 U.S.C. 551; 36 C.F.R. 261.1(b).

The operating plans referred to in 36 C.F.R. 261.10(k) are governed by 36 C.F.R. Pt. 228. These regulations provide that no work on an unpatented mining claim that is

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[5] On the specific subject of timber cutting, Section 612(c) of 30 U.S.C. provides that:

> Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

likely to cause a "significant disturbance of surface resources" shall proceed without an approved operating plan. 36 C.F.R. 228.4(a). Before beginning work of that nature, a miner must submit for approval by the District Ranger of the Forest Service a proposed plan that describes the scope of the intended activity and proposed measures to minimize environmental harms. 36 C.F.R. 228.4(c), 228.8. All mining operations must conform to the terms of the plan, 36 C.F.R. 228.4(b), 228.5(a), which is subject to modification at the request of the claimant according to procedures prescribed by regulation. See 36 C.F.R. 228.4(d)-(e); see also *United States* v. *Brunskill*, 792 F.2d 938, 940 (9th Cir. 1986); *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307 (9th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

3. In 1972, petitioners staked a series of mining claims in the Red River Ranger District of the Nez Perce National Forest in central Idaho. Magistrate's Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), slip op. 2 [hereinafter Mag. Op.]. The two petitioners worked the claims every year between 1972 and 1985. Except in the first few years, they mined under an approved operating plan. The 1985 operating plan was signed by Rory Doremus and the District Ranger in May 1985. *Ibid.*

The 1985 plan described the scope of the authorized exploration. See Pet. App. 115a. The plan provided for modification or supplementation in the event that the nature of the operation changed, and it stipulated that requests for amendments to the plan were to be submitted in writing and approved by the Forest Service before petitioners deviated from the operating plan in any way. *Id.* at 147a. After the plan had been signed, petitioners orally requested certain amendments, but none relevant to the

charges here was granted. *Id.* at 3. Petitioners did not appeal the denials of their requests.[6]

The operating plan stated that, for each of petitioners' six claims, "[n]o more than five trenches will be open at one time," excluding one "discovery pit"—a trench in which potentially valuable mineral deposits are found in the course of mining. Pet. App. 115a-116a. It prohibited "construction or improvement of roads, trails, bridges or any other means of access"—including "Temporary Roads"—without prior written approval. *Id.* at 118a, 121a. The plan also prohibited the cutting of "live, green trees" for firewood; any firewood was to be obtained from trees designated by a Forest Service inspector. In addition, "[n]o green trees [were to] be used in camp construction unless designated by the inspector." Pet. App. 128a. The plan also stated that "[t]imber requirements are small for

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[6] Rory Doremus and Forest Service employee Ronald Gardner gave inconsistent testimony as to whether Gardner ever purported to grant oral modifications of the operating plan. Compare Mar. 14, 1986 Tr. 19-20, 127-128 (testimony of Ronald Gardner), with *id.* at 129-132 (testimony of Rory Doremus). The magistrate found that "no amendments were ever agreed to by the Forest Service, and no amendments, either verbal or in writing, ever occurred." Mag. Op. 3.

The court of appeals ruled that "the magistrate's finding that no oral amendments to the plan were made in 1985, except for an authorization to remove one tree, is not clearly erroneous." Pet. App. 27a. The court of appeals' suggestion that the Forest Service purported to grant an oral modification with respect to a single tree appears to be based on Gardner's testimony that he designated a tree for removal after Rory Doremus expressed concern that it could fall into an adjacent mining pit. See Mar. 14, 1986 Tr. 126-128. The court of appeals did not discuss whether Gardner's action could have come within his authority under the plan to designate trees for use as firewood. See Pet. App. 127a. It also did not discuss whether any oral modification could have been effective in view of the plan's requirement that requests for amendments and any approvals of those requests be in writing.

this operation at this time. If timber is needed operator is asked to cut small dead timber." *Id.* at 129a. The plan did not otherwise address the clearance of trees from prospecting sites.

4. In late July 1985, Forest Service officials conducted several inspections of petitioners' operations. Mag. Op. 3-4. The inspections revealed that several trees had been pushed over and that a road had been constructed through the trees on one side of the claim. Mag. Op. 4; Pet. App. 7a, 82a-83a, 104a. The Forest Service also found more than 30 open trenches. Mag. Op. 3-4; Pet. App. 7a, 83a. All told, petitioners' operations had damaged surface resources covering about 1.25 acres of the national forest, which far exceeded the roughly .25 acre of surface damage authorized in the operating plan. Mag. Op. 4.

On October 21, 1985, each petitioner was issued two violation notices, one for damaging trees and other natural features in violation of 36 C.F.R. 261.9(a), and one for opening more trenches than permitted under the operating plan, in violation of 36 C.F.R. 261.10(k). Pet. App. 34a-39a.

5. Petitioners contested the charges against them in proceedings before a United States magistrate, which included a trial and extensive post-trial briefing. Before the magistrate, petitioners argued, *inter alia,* that the regulations and operating plan taken together were unconstitutionally vague, both facially and as applied; that the regulations and operating plan violated their statutory right to mine; that the United States had failed to prove the charges beyond a reasonable doubt; that the 1985 operating plan was procedurally defective because the Forest Service had "unilaterally imposed" changes in the plan proposed by petitioner; and that, even if valid, the operating plan had been modified by an oral agreement

authorizing the conduct in question. Petitioners' Post-Trial Br. 1-24; Petitioners' Post-Trial Reply Br. 1-7.

The magistrate rejected petitioners' contentions. The magistrate found that Sections 261.9(a) and 261.10(k) were neither vague nor indefinite on their face or as applied to this case, Mag. Op. at 5; that the regulations and operating plan did not impose unreasonable restrictions on petitioners' statutory rights to exploit mineral deposits on public land, *id.* at 6-7; that the United States had proved the violations charged beyond a reasonable doubt, *id.* at 7-8; that the defendants had agreed to the operating plan as written, *id.* at 7; and that "no amendments, either verbal or in writing, ever occurred," *id.* at 3.

6. Petitioners appealed the magistrate's ruling to the district court, reiterating the arguments that the regulations they were charged with violating were unconstitutionally vague and that those regulations as well as the restrictions contained in the operating plan violated their statutory rights. The district court upheld the magistrate's decision. Pet. App. 80a-111a. The court rejected petitioners' contention that miners can defend against prosecution under Forest Service regulations by attempting to establish that their conduct, although damaging to surface resources and inconsistent with their operating plans, is "reasonably incident" to mining operations. The court explained that the operating plan regulations, 36 C.F.R. Pt. 228, had been promulgated "within the framework dictated by Congress to balance the competing interests of the miners and the environment and to provide definition to what is and is not considered reasonable." Pet. App. 89a. Operating plans, the court explained, "provide the miner with a description of that conduct which is acceptable under the circumstances and that conduct which tips the scales to the detriment of the environment." *Id.* at

93a-94a.[7] The court also held that the regulations at issue—36 C.F.R. 261.9(a) and 261.10(k)—were not unconstitutionally vague on their face or as applied. Pet. App. 95a-108a. It also affirmed the magistrate's finding that the government had proved violations of both regulations beyond a reasonable doubt. *Id.* at 108a-109a.

7. On appeal, petitioners renewed the arguments that the district court had rejected. David Doremus also repeated arguments concerning Forest Service coercion and oral modifications that had been made to the magistrate but abandoned in the district court. The court of appeals affirmed the judgment of the district court. Pet. App. 1a-29a.

The court of appeals rejected petitioners' assertion that their statutory right to mine on public land shielded them from prosecution for violating the conditions of their operating plan. Specifically, the court held that both Section 261.9(a) and Section 261.10(k), as applied to peti-

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[7] The court explained (Pet. App. 92a-93a):

> [I]n this area Congress has provided broad policy statements recognizing the competing interests of mining operations and the environment. Congress has directed the Secretary of Agriculture to draft regulations which do not materially interfere with mining operations and the reasonable incidents thereto, but which, at the same time, protect the environment from unbridled destruction. The regulations drafted by the Secretary cannot contemplate or define what is reasonable conduct with respect to mining under all circumstances. With this in mind, the regulations provide for a vehicle by which representatives of the Secretary, together with the mining operator, define what is reasonable under the circumstances attendant the specific mining operation. This vehicle is the operating plan. The regulations of the Secretary also provide that violation of this plan is prohibited, since such action would be unreasonable under the circumstances. * * * Conduct which is violative of the operating plan violates the regulatory scheme and the statutory scheme.

tioners' conduct, were consistent with the mining laws, including 30 U.S.C. 612, which permits miners to make uses of surface resources that are "reasonably incident" to the mining operation. Pet. App. 12a-17a. The court stated that "[t]he regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between the important interest[s] involved here [which] were intended to and can coexist." *Id.* at 13a (internal quotation marks omitted). The court explained that "[t]he purpose of requiring prior approval is to resolve disputes concerning the statutory balance *before* operations are begun, not after." The court added that if petitioners were unsatisfied with the conditions in their operating plan, "they could have appealed to the Regional Forester under 36 C.F.R. § 228.14 (1987)." Pet. App. 13a.

The court also rejected petitioners' vagueness challenge to Sections 261.9(a) and 261.10(k). Pet. App. 17a-25a. In particular, the court disagreed with petitioners' contention that the pertinent statutory provisions and regulations could be read to permit conduct that is not in compliance with an operating plan but is nevertheless "reasonably necessary" to a mining operation.[8] The court noted that petitioners could easily have "clarif[ied] the meaning of the regulation[s]"—including the relationship among all the regulations and statutory provisions on which they rely—"by [their] own inquiry, or by resort to the administrative process." Pet. App. 23a. With respect to 36 C.F.R. 261.10(k), which prohibits deviation from an

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[8] That contention was based in part on the language of 36 C.F.R. 261.1(b), which states that "[n]othing in this part shall preclude activities as authorized by" the Mining Act as amended, and the language of 36 C.F.R. 228.7, which states that a notice of noncompliance will issue "[i]f an operator fails to comply with * * * his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources." See Pet. App. 20a-21a.

operating plan, the court found that the regulation was not vague as applied to petitioners because the plan was "crystal clear" in prohibiting the simultaneous opening of more than five trenches on petitioners' claim. Pet. App. 19a-20a. With respect to the other challenged regulation, 36 C.F.R. Section 261.9(a), which prohibits "[d]amaging any natural feature or other property of the United States," the court found that the regulation was sufficiently precise to give petitioners notice that the regulation covered their actions in "destroying [or] push[ing] over" live trees.[9]

ARGUMENT

1. Petitioners contend that the 1985 operating plan imposed limitations on their mining activities that should be held unenforceable in light of their rights under federal mining statutes. Petitioners also appear to suggest that the scope of the regulatory prohibitions under which they were convicted should be viewed as circumscribed by their right to conduct activities on their claims that are "reasonably incident" to mining, see 30 U.S.C. 612, and that their activities satisfied that statutory standard.[10]

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[9] The court also rejected petitioner David Doremus's contention that the magistrate's factual findings concerning oral amendments to the plan were in error. Pet. App. 27a. The court did not explicitly address the claim that the brothers had been coerced to agree to the plan, but it did recite the magistrate's factual finding that petitioners had proposed the limits on the number of trenches that were incorporated in the plan. *Id.* at 7a. The court refused to consider constitutional arguments alleging violations of the separation of powers and the right to a jury trial, which were raised for the first time on appeal. *Id.* at 27a.

[10] Rory Doremus, the petitioner in No. 90-453, seeks review only of his conviction under Section 261.9(a). David Doremus, the petitioner in No. 90-466, seeks review of both of his convictions.

The court of appeals properly rejected these arguments. As the courts below observed, the Forest Service regulations are designed to give content to the statutory concept of activity "reasonably incident" to mining. The regulations authorize the Service to determine what conduct is "reasonably incident" to mining in each case, and they provide a mechanism for ensuring that mining activities conform to that standard by requiring the submission and approval of an operating plan before mining activities may commence. This regulatory scheme contemplates that claimants who are dissatisfied with proposed restrictions in their plans, or who believe that those restrictions infringe their statutory rights, will challenge their plans before the agency at the approval stage or formally seek an amendment of the plan. See Pet. App. 13a (the regulatory requirement that miners seek approval of their operating plans is intended "to resolve disputes concerning the statutory balance *before* operations are begun not after"). Petitioners took neither of those steps; instead, they agreed to the plan. Mag. Op. 2.[11] By doing so, petitioners failed to take advantage of available administrative remedies, thereby forfeiting the right to challenge the

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[11] Petitioners could have filed an appeal of the restrictions on the number of open trenches in their plan with the Regional Forester under 36 C.F.R. 228.14 (1987). (Current appeal procedures appear at 36 C.F.R. Pt. 251, Subpt. C.) See Pet. App. 13a-15a; 26a-27a. The Regional Forester's decision would have been reviewable under the Administrative Procedure Act, 5 U.S.C. 702(a). See Pet. App. 13a, citing *Sabin* v. *Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975) (APA review of Forest Service decision to deny special use permit).

Petitioners did request some oral amendments to their plan, which the Forest Service denied. Petitioners, however, failed to seek review of those denials under the APA. In any event, petitioners' operating plan provided that any requests for amendments to the plan were to be in writing.

terms of the plan. See *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969).

The requirement that litigants exhaust available administrative remedies rather than challenge administrative action in litigation is not confined to situations where the governing statute expressly requires exhaustion. See *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1093 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); *American Iron & Steel Inst.* v. *EPA*, 526 F.2d 1027, 1050-1051 (3d Cir. 1975). Nor is it confined to situations where the option of pursuing the administrative process to completion remains open at the time the litigation begins. See *McKart*, 395 U.S. at 194-195. To be sure, whether the requirement of exhaustion applies in a particular case depends on the administrative scheme at issue and the factual context. See *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McKart*, 395 U.S. at 193. Where, as here, enforcement of the exhaustion requirement forecloses a possible defense to criminal liability, the governmental interest in adherence to the doctrine must outweigh the burden placed on the criminal defendant. See *McKart*, 395 U.S. at 197; *Yakus* v. *United States*, 321 U.S. 414 (1944). The reasons for requiring exhaustion in this case, however, are quite compelling. Operating plans embody the informed judgment of the Forest Service as to the level of surface damage that is reasonably incident to a particular mining operation. The exercise of agency expertise to develop concrete, site-specific standards that balance conflicting statutory goals of mineral development and national forest preservation would be circumvented if miners could "blithely ignore Forest Service regulations and argue afterward that their conduct was reasonable." Pet. App. 15a. The case for requiring exhaustion of administrative remedies is particularly compelling when the immediate basis for liability is

not simply a generally applicable regulation, but an operating plan that has been specifically designed for a particular individual and with which that individual has agreed to comply.

2. Petitioners argue (90-453 Pet. 25-27; 90-466 Pet. 15) that their convictions violate the due process requirement that criminal offenses be defined with sufficient clarity to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954).

Contrary to petitioners' contention, the regulations provided fair warning that petitioners' activities were unlawful. Section 261.9(a) prohibits the "damaging" of "any natural feature" within the national forest without authorization, and "damaging" is defined to include cutting or excavating. 36 C.F.R. 261.2. Petitioners' unauthorized acts of cutting timber, excavating trenches, and building a road clearly constituted acts of "damaging * * * natural features" within the forest without authorization. Similarly, Section 261.10(b), which prohibits "[v]iolating any term or condition of * * * [an] approved operating plan" could hardly be clearer. The regulation plainly prohibits any deviation from the operating plan that is not authorized by a properly issued amendment.

The court of appeals correctly rejected petitioners' argument that 36 C.F.R. 261.1(b), which states that nothing in 36 C.F.R. Pt. 261 "shall preclude activities as authorized by the * * * U.S. Mining Laws Act of 1872 as amended," can be construed to invite miners to look beyond their operating plans and other pertinent regulations for statutory permission to conduct activities "reasonably incident" to mining. 90-453 Pet. 15-16. The regulations at issue cannot be read to permit the application of a test of reasonableness independent of the terms of the operating plan. As the court of appeals stated, "[t]he flaw in [petitioners']

argument is that 30 U.S.C. § 612 does not authorize mining operators to act without Forest Service approval," Pet. App. 25a, and the regulations make it plain that mining may not be conducted without prior approval, 36 C.F.R. 228.4(a), or in violation of an approved operating plan, 36 C.F.R. 261.10(k), or in a manner that would "damage any natural feature," without authorization, 36 C.F.R. 261.9(a). Thus, the regulations that were the basis of petitioners' convictions provide ample notice that the mining activities on petitioners' claims that violated their terms were prohibited.

3. Petitioner Rory Doremus also contends (90-453 Pet. 26-28) that there was a failure of effective notice as to the illegality of the petitioners' tree clearing because the operating plan did not expressly prohibit the removal of live trees to clear the ground over prospecting sites. He argues that the Forest Service regulations did not provide fair warning that activities not mentioned in the operating plan as well as activities expressly forbidden could be illegal under Section 261.9(a).

This claim ignores the structure and language of the operating plan regulations. Operating plans provide concrete, site-specific guidance as to the balance between mineral exploration and the protection of surface resources in the national forests. See 36 C.F.R. 228.1. As a practical matter, it would be virtually impossible for an operating plan to forbid every kind of possible damage to surface resources. Forest Service regulations instead call for a description of "the type of operations proposed and how they would be conducted." 36 C.F.R. 228.4(c). They further provide that "[o]perations shall be conducted in accordance with an approved plan." 36 C.F.R. 228.5(a). As contemplated by the regulations, petitioners' operating plan describes the scope and location of authorized activities. But, while the plan includes a number of express

prohibitions, Pet. App. 114a-131a,[12] the inclusion of those prohibitions cannot mean that anything not specifically prohibited in the plan is permitted. That is particularly true with respect to conduct such as destroying trees, which is elsewhere prohibited in the Forest Service regulations.

4. Petitioner Rory Doremus contends (90-453 Pet. 27-28) that in affirming his conviction under Section 261.9(a), the court of appeals repudiated controlling precedent and therefore unfairly imposed on him a new and unforeseeable construction of the scope of criminal liability in this area. This contention is incorrect; the Ninth Circuit case on which petitioner relies does not shield miners from prosecution for violations of valid regulations and operating plans.

In *United States* v. *Cruthers*, 523 F.2d 1306 (9th Cir. 1975), the court of appeals reversed a miner's conviction for the theft of 70 pine trees from the surface of an unpatented mining claim. The miner, who used the trees to construct a cabin on his adjacent, patented claim, was found guilty of theft based on a jury instruction that 30 U.S.C. 612(c) did not permit the use of timber from an unpatented claim on private property "for any purpose." The court found that Section 612(c) required that timber cut from an unpatented claim be used only for purposes "reasonably incident" to the development of that claim, but did not require that the timber be used within the physical limits of the claim. 523 F.2d at 1307. The court of appeals' brief opinion gives few facts and makes no mention of an operating plan.[13]

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[12] Petitioners' unauthorized destruction of natural features encompassed not only the destruction of trees, but also unauthorized road construction and excavation. See Pet. App. 37a, 39a (violation notice noting damage to trees and "other surface resources"); see also Mag. Op. 4; Pet. App. 7a, 82a-83a. The road construction in particular violated an express prohibition in the operating plan.

[13] It is highly unlikely that Cruthers was subject to an operating plan when he cut the trees in question. The operating plan regulations

In any event, Ninth Circuit cases decided after *Cruthers* soundly refute petitioner's contention that the court has held that miners may conduct operations in violation of the requirements of their operating plans. See *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (1981) (affirming award of damages and injunctive relief against company that "cut trees, dug roads, erected structures, moved earth and otherwise damaged forest surface land" without an operating plan), cert. denied, 455 U.S. 907 (1982); *United States* v. *Weiss*, 642 F.2d 296 (1981) (affirming injunction against operations on unpatented national forest claim until miner complied with operating plan regulations); see also *United States* v. *Brunskill*, 792 F.2d 938 (9th Cir. 1986) (post-1985 case affirming injunction that required removal of buildings and equipment for failure to obtain operating plan). These cases, which hold that the right to conduct mining operations is contingent on compliance with the operating plan regulations, leave no doubt that petitioner's activities were subject to the same restrictions.

5. Finally, both petitioners attack the judgment below on the ground that the Forest Service violated a supposed policy of safeguarding miners' rights by using the prosecution of individuals who violate Forest Service regulations as "a compliance measure of last resort." 90-453 Pet. 21-24; 90-466 Pet. 9-10, 14-15. Petitioners derive this supposed policy principally from 36 C.F.R. 228.7, which calls for Forest Service officers to issue a "notice of non-com-

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were promulgated only 13 months before the appeal was decided. See 39 Fed. Reg. 31,317 (1974). It is not even clear whether Cruthers' unpatented claim was on national forest land or on a type of federal land for which operating plans are not required. See *Richardson*, 599 F.2d at 293-295 (discussing management of surface resources on unpatented mining claims by the Department of Interior's Bureau of Land Management).

pliance" when miners' violations of operating plan regulations cause unnecessary or unreasonable damage to surface resources, and from the general guidelines contained in Sections 2817.03 and 2817.3 of the Forest Service Manual, see Pet. App. 62a-69a.

The provisions on which petitioners rely present no obstacle to upholding petitioners' convictions. Section 228.7 of the operating plan regulations does not limit enforcement under Part 261 of 36 C.F.R., either expressly or by implication. As the court of appeals observed, the absence of independent enforcement provisions in Part 228 and the reference to operating plan violations in Section 261.10 undercuts any argument that Part 228 provides the exclusive means of enforcing operating plan violations. Pet. App. 10a-11a. And the Forest Service Manual, as the court of appeals stated, "merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." Pet. App. 27a. That conclusion accords with the more general point that internal agency guidelines, unless mandated by the Constitution or a statute, do not have the force of law. See *United States* v. *Caceres*, 440 U.S. 741, 749-751 (1979); *United States* v. *Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980).[14]

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[14] Petitioner Rory Doremus's argument (Pet. 24-25) that the rule of lenity compels reversal of his conviction for destroying natural features is also without merit. The rule of lenity functions as a tie-breaker in cases in which the normal tools of statutory construction cannot resolve an apparent ambiguity in a criminal standard. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 29 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 342-343 (1981). Petitioners' convictions under Section 261.9(a), however, present no ambiguity to be resolved.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 90-453 and 90-466

IN THE

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OCTOBER TERM, 1990

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vs.
UNITED STATES OF AMERICA,
Respondent.
and
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WESTERN MINING COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WESTERN MINING COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

The Western Mining Council, Inc., files this brief as amicus curiae in support of the Petitioners' request for

a Writ of Certiorari. Consent to file the brief has been obtained from the attorney for Petitioner Rory Doremus, from Petitioner David Doremus, and from the attorneys for Respondent United States of America.

INTEREST OF AMICUS CURIAE.

The Western Mining Council, Inc., is a California non-profit corporation representing United States citizens who conduct mineral exploration and mineral development on the public lands of the United States, including on public land in the National Forests. The members of the Western Mining Council are some of the thousands of American citizens who explore for minerals and develop mines in the vast and largely unexplored forests, mountains and deserts of the Western United States. The Western Mining Council includes many individuals, small businesses, smaller companies (less than

50 employees), and many family or "mom-and-pop" mineral exploration and development businesses.

The Western Mining Council is concerned with the acts of unfair and unlawful discrimination against mineral prospectors and developers on public land, including tactics of the United States Forest Service ("Forest Service") specifically directed against thousands of small businesses and mineral development businesses. These tactics include the Forest Service's aggressive and wrongful enforcement of inapplicable criminal laws, the issuance of wrongful criminal citations against mineral developers and the imposition of unreasonable restrictions and conditions on operating plans and permits to do mineral prospecting and mining in the National Forests. The purpose of this brief as amicus curiae is to discuss how

the issues in this case and the Forest Service's continuing unreasonable activities are devastating and destroying the mineral exploration and development industry in the United States, to the detriment of the miners, the local economies, small businesses, and which are seriously detrimental to the productivity and security of the United States of America. The Forest Service is seriously inhibiting mineral exploration and development in the United States at a time when this country critically needs to encourage mineral development and production and to encourage small business generally.

The Western Mining Council respectfully requests that this Court, in rendering their opinion and in reviewing the Petitioners' convictions for removing trees from their valid mining claims, clarify the right of private

mineral developers relative to plans of operations without the necessity of a separate permit or plan amendment for each necessary act or for each tree which the miner finds reasonably necessary to remove, and confirm the inapplicability of certain criminal laws in the National Forests.

The existing Forest Service policy of aggressive issuance of citations for minor criminal offenses against miners in the National Forests, and the application of arbitrary criteria for "conditions" on operating plans imposed upon miners by local officers of the Forest Service, have created ambiguity, disputes and abuse by local Forest Service officers. Examples of such ambiguity and disputes are the instant case and the multitudes of other cases of petty offense violations and disputes over plan of operation conditions,

including those examples referred to in the opinions in **United States v. Craig**, CR-82-8-H (D.C. Mont 1984), in **United States v. Patrin**, Civil No. 1-72-135 (D.C. Idaho 1974), in the facts in the case reported by the court in **United States v. Weiss**, 642 F.2d 296 (9th Cir. 1981), in the facts in other cases cited in the briefs of both Petitioners in this petition, and, thousands of unreported field incidents. For these reasons, this court's review is needed, and the Western Mining Council submits this brief in support of the Petitioners' request for a writ of certiorari.

A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. PETITIONERS' CONVICTIONS ARE UNCONSTITUTIONAL BECAUSE THEY ARE UNSUPPORTED BY LAW OR EVIDENCE, AND PETITIONERS' ACTS WERE AUTHORIZED UNDER THE MINING LAW.

The government's hearing evidence

before the U.S. Magistrate did not meet the burden of proof that the Petitioners' activities were unreasonable and unnecessary to the operation of their valid unpatented mining claims. The evidence did not show any illegal activity by either defendant, and the evidence showed that the acts of the Forest Officers were unjustified and illegal.

The mining claims of the Petitioners were valid, and the validity is not an issue here. These unpatented mining claims were being developed under the specific provisions of the General Mining Law (30 U.S.C. §21, et seq., as amended). The rights of individuals under the Mining Law have been specifically reaffirmed by Congress many times, notably including reaffirmation in 1955 in 30 U.S.C. § 612, in 1970 in 30 U.S.C. § 21(a), in 1976 in 43 U.S.C.

§ 1732, and in 1980 in 30 U.S.C. § 1601. The Forest Service regulations themselves specifically provide that "...[n]othing in [36 C.F.R. § 261] shall preclude activities as authorized by ... the U.S. Mining Laws Act of 1872, as amended."

The activities of the Petitioners were authorized by the Mining Law and by numerous judicial reaffirmations thereof, as established in the express holding in U.S. v. Caruthers, 523 F.2d 1306 (9th Cir. 1975), that the statutory authority granted to the owner of a mining claim under 30 U.S.C. § 612, precluded the owner's criminal conviction for the removal of trees from his claim. The activities of the instant Petitioners were also authorized under the Forest Service regulations themselves. Since the Petitioners' activities were not shown to be un-

reasonable or illegal, the Petitioners cannot be prosecuted for these acts.

The Court of Appeals upheld the instant criminal convictions based upon Petitioners' alleged violations of 36 C.F.R. §§ 261.9(a) and 261.10(k), which prohibit "...[d]amaging any natural feature or other property of the United States" (36 C.F.R. § 261.9(a)), and "... [v]iolating any term or condition of ...[an] approved operating plan." (36 C.F.R. § 261.10(k)). Petitioners' convictions under 36 C.F.R. §§ 261.9(a) and 261.10(k) conflict with, and are specifically preempted by, 36 C.F.R. §§ 261.1(b), 261.6(a), 261.6(b), 261.9(a), and 30 U.S.C § 612. 36 C.F.R. §261.1(b) provides that "... [n]othing in this part [i.e., 36 C.F.R. §261] shall preclude activities authorized by ... the U.S. Mining Laws Act of 1872 as amended." 30 U.S.C § 612(a) prohibits

removal of vegetation "... [e]xcept to the extent required for mining claimant's prospecting, mining, or processing operations and uses reasonably incident thereto, ... or to provide clearance for such operations or use." So, contained within 36 C.F.R. § 261 is the specific authority that any conflicting provisions of § 261 will be preempted by the Mining Law.

The court in U.S. v. Weiss, supra, at 299, stated that 36 C.F.R § 261.1(b) is a recognition that mining operations "... may not be prohibited nor unreasonably circumscribed as to amount to a prohibition." That acknowledgement clearly establishes the supremacy of the General Mining Law's provisions over the restrictive and conflicting prohibitions contained in the regulation in 36 C.F.R. §§ 261.9(a) and 261.10(k).

B. THE LAWS AND FOREST SERVICE REGULATIONS WERE APPLIED IN AN ARBITRARY AND DISCRIMINATORY MANNER IN THIS CASE.

Petitioners' convictions are unconstitutional in that the Forest Service, in issuing Petitioners a criminal citation, applied its regulations in an arbitrary and discriminatory manner in violation of the doctrine of equal protection of the laws under the United States Constitution. The long line of cases of illegal government discrimination based upon race is useful in analyzing the instant case. In an early discrimination case, Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court invalidated a San Francisco city ordinance which allowed the rejection of a permit for Yick Wo to operate a laundry in a building not constructed of brick or stone, where the authorities approved laundry permits for non-Chinese persons

to operate in such buildings while rejecting all applications by Chinese. The court reasoned that "... the idea that any man's livelihood depends upon the mere will of another is the essence of slavery ... [if the disapproval be administered] with an evil eye and an Unequal Hand ...", and that such would be an unconstitutional denial of equal justice.

The Yick Wo and the instant Doremus cases are analogous in that, while not racially motivated, the Forest Service in the instant case is arbitrarily, intentionally and unlawfully preventing particular persons, i.e., mineral prospectors and developers, from validly exercising their rights under the Mining Law and the U.S. Constitution. The Forest Service's issuance of arbitrary citations and their placing of unjustified "conditions" upon miners'

operating plan "approvals" under 36 C.F.R. § 261.1(a), are nothing more than arbitrary de facto denials of citizens' rights to conduct good faith mineral exploration and mining in the National Forests. The preventing of the Petitioners from operating on their valid mining claims in the National Forest by the means of criminal citations for alleged petty offenses and by unreasonable operating "conditions" is somewhat more sophisticated that the denial of Yick Wo's laundry permit, but each is a wrongful deprivation of rights by a government agency. The instant Doremus case demonstrates most clearly the arbitrary and unconstitutional discrimination against mineral prospectors and miners in the National Forests, particularly in view of the specific mandate in its own Forest Service Manual (§§ 2814.21 and 2814.24) to "... respect

[mining] claims and claimants' property ..." and to provide to "... prospectors and miners operating plan provisions in order that they may carry out necessary mineral associated activities." The express Forest Service policies are set out in the United States Forest Service Manual, in the regulations and in the statues, including the following:

> "The right of reasonable access for purposes of prospecting, locating and mining is provided by statute." Forest Service Manual, § 2813.14;
>
> "The Forest Service must respect claims and claimants' property by using precautions to avoid damage to claim corner markers, excavations, and other mining and improvements." Forest Service Manual, § 2814.21;
>
> "Forest officers should provide bona fide prospectors and miners reasonable alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they [i.e., the prospectors and miners] may carry out necessary mineral associated activities without violation of laws and regulations." Forest Service Man-

ual, § 2814.24;

"Nothing in 36 C.F.R. § 261 shall preclude activities as authorized by the Wilderness Act of 1964 or the U.S. Mining Laws Act of 1872, as amended," 36 C.F.R. § 261.1(b).

These statements of law and policy are very clear and unequivocal, and must be held to override the arbitrary "unwritten" power of local Forest Service officers to issue arbitrary citations or to attach unworkable or unreasonable conditions to the "approval" of a miner's otherwise reasonable plan of operations under the purported authority of 36 C.F.R. § 261.1(a).

The local Forest Officer has been given the power to "approve" the miner's plan of operations, or to "... place such conditions on the authorization as the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety or

welfare." 36 C.F.R. § 261.1(a).

The authority of a Forest Service officer to determine whether a specific activity is "... damaging any natural features" or "... violating any term or condition of ... [an] approved operating plan ..." under 36 C.F.R. § 261.1 (a) was clearly too broad and vague on its face to be reasonable or workable. In the instant case, the direct and immediate effect of the "conditions" imposed upon the Doremus brothers by the Forest Officer under the authority of 36 C.F.R. § 261.1(a) was to deprive the Doremus brothers of their chosen livelihood of reasonably developing unpatented mining claims in the National Forest. As set out in the trial transcript, and as is patently obvious, although technically "possible," it is not reasonably feasible for a miner to stop all mining

operations in order to reapply for a plan amendment each time it becomes reasonably necessary to cut down an unanticipated tree or to dig another reasonable trench. To impose such a requirement on miners would frustrate mining operations to such a degree as to make them economically prohibitive, and such a requirement would terminate many legitimate mineral exploration and development operations--a result which the Forest Service regulations, public policy, common-sense national survival instinct and the U.S. Constitution specifically forbid.

This court's reversal of the two Petitioners' erroneous convictions in this case would partially alleviate the Doremus brothers' current impediment to carrying on their livelihood as virtually the last remaining miners in the Nez Perce National Forest in Idaho.

However, the Western Mining Council is gravely concerned that the rights of the Doremus brothers, and of all other mineral developers in the National Forests in the United States, are seriously endangered, and that these rights should be clarified relative to a citizen's right to prospect and mine in a National Forest under the Mining Law, specifically including a miner's right to legally cut some trees in the reasonable development of his mining claim.

The Western Mining Council hereby respectfully requests that this Court, in granting certiorari and in accepting in this case, specifically delineate reasonable criteria which apply to the facts in this instant Doremus case, as well as to other mineral prospectors and miners, relative to their rights to prospect and mine in National Forests under the Mining Law, free from unlawful

restriction. This Court should define and delineate the limited permissible scope of Forest Service control over mineral exploration and development in National Forests; and the result would be guidelines obviating many detrimental and economically fatal delays and difficulties such as those experienced by the Petitioners in the instant case, and by many others.

The Forest Service "petty offense violation" procedures, when combined with other tactics as set out in the hearing transcript in this case, clearly show the potential and actual abuse and "arbitrariness," particularly when the same Forest Service officer who administers and writes up the "plan conditions" also writes the citations.

Many federal administrative agencies "administer" all three functions of government (executive, legislative and

judicial) within the province of the tasks delegated to them by Congress. However, the opportunity for arbitrary action, and specific instances of abuse, must be fully considered when reviewing such a broad "sub-sub-delegation" of power as the instant regulations empowering the local Forest Service officer to issue citations, and, also, to "place such conditions" on his approval of the operating plan as "the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety, or welfare." (36 C.F.R. § 261.1(a)).

If a Forest Service officer chose to prohibit all mineral exploration and development in "his" National Forest, it would be, and is, all too easy for him to do so by issuing citations for alleged petty offenses, and by imposing

difficult plan conditions under the overly broad and vague delegation of multiple powers to Forest Service officers under 36 C.F.R. § 261.1(a).

The instant case cries out for clarification of the scope of Forest Service authority to arbitrarily deny to mineral developers the reasonable freedom of activity upon which their livelihood depends; and this case is just such an opportunity for this Court.

C. THE ISSUES PRESENTED HEREIN ARE OF CRITICAL IMPORTANCE TO MINERAL EXPLORATION AND DEVELOPMENT IN THIS COUNTRY AND TO THE PRODUCTIVITY AND SECURITY OF THE UNITED STATES.

The significance of the issues presented herein cannot be minimized at a time when this country's future prosperity, economic well-being and military security rest so squarely on our ability to continue to efficiently explore for and supply minerals to our country.

The primary source of minerals in the United States is the public lands which are open for mineral exploration and development. This country depends upon our incentive-based Mining Law to motivate citizens to explore for minerals, to develop mining operations and to provide the United States with a reliable continuous flow of minerals for industrial, commercial and military uses.

If mineral development is further impeded in the United States, the result will be the loss of future discoveries and development of those minerals vital to the productivity and security of this country. Forest Service practices have already terminated most mineral exploration and development in National Forests by issuing "fatal" criminal citations for alleged minor offenses and by placing overly restrictive conditions on

plans of operation. The Forest Service has effectively eliminated thousands of mineral development operations on our public lands, including those of the Doremus brothers, who had maintained "virtually the last of the operating mine in the Nez Perce National Forest in Idaho." The instant case is an example of arbitrary over-regulation of mineral development through the use of unjustified criminal citations and unreasonably restrictive conditions on plans of operation. These violations of the express mandate of the Mining Law, and the express letter and spirit of the Forest Service Manual, have "thrown out" large numbers of mineral developers and miners from public land in the National Forests.

Our National Forests do not "belong to" the Forest Service, they are public land open to mineral exploration by U.S.

citizens under the Mining Law. Because the Forest Service literally "loses control" of the land when minerals are discovered, a "turf war" results when a mineral developer seeks a Forest Service permit, because the Forest Service controls only the land surface, and want to "keep" control. The result is not only a "chilling" effect, but the absolute destruction of a large majority of the legitimate mineral developments on "Forest Service" land, causing a substantial reduction of mineral exploration and development in the United States.

It is essential to the security and productivity of the United States that we maintain and increase our mineral exploration and development in this country in order to prevent the United States from becoming dependent upon and subservient to foreign sources for

minerals.

Despite the expressly stated U.S. policy of encouraging mineral exploration and development, recent substantial decreases in mineral development has resulted in the loss of thousands of jobs and small businesses, which have been "exported" overseas. Foreign nations are more than anxious to develop their own mineral resources and to sell their minerals to the United States. In September 1990 Mexico dropped their "51% Mexican ownership" requirement to encourage their own mineral development, and now allows 100% non-Mexican ownership of mineral operations.

Vigorous recent foreign mineral development combined with obstructive U.S. governmental actions is resulting in the following devastating long-term detrimental effects and costs to the United States and to its citizens:

Cost #1--Dependence Upon Foreign Sources for Minerals. Probably the most serious effect of the devastation of the U.S. mineral exploration and development industry is the increased dependence of the United States upon, and subservience to, unreliable and unpredictable foreign sources for essential minerals and rare earths indispensable to maintaining our dominant position in military hardware, space technology, nuclear fusion and superconductivity. We cannot fault Mexico developing their minerals. Rather, we should seek to decrease our own dependence upon and our potential subservience to foreign sources for essential minerals from South Africa, the Soviet Union, Mexico and, recently, even from Mongolia and Vietnam. No dollar value can be placed upon the U.S. retaining its position as the world leader in high technology research,

security and national defense. The list of affected minerals is long and varied, including: Iron ore, rare earths, rhodium, palladium, other platinum group metals, precious metals, talc, titanium, chromium, and others.

Cost #2 -- Increased Prices of Minerals. Dependence upon foreign mineral sources will result in the increased cost of many essential minerals and rare earths, with prices continuing to rise because of the disappearance of the supplies and identified future sources of these minerals from the United States public lands. The U.S. will then be subject to the uncertainties of unreliable foreign sources and cartels for many essential, critical and strategic minerals, just as we were in the oil "shortage" of the 1970's, and as we are today dependent upon South Africa and the Soviets for

virtually all of our chromium and rhodium. The price of rhodium has skyrocketed from $1,300/ounce in November 1989 to $6,000-$7,000/ounce today, and is expected to rise even more soon.

Cost #3--Fifth Amendment "Takings". Many of the restrictions and regulations which destroy and close down mineral development operations in the United States have resulted in compensable takings under the Fifth Amendment. Executive Order No. 12630 (Fed. Register, March 16, 1988), as reissued by President Bush in 1990, requires that all federal agencies provide a specific written Taking Implication Assessment ("TIA") on the effect of agency regulations and decisions on the taking of private property, explicitly identifying and including "regulatory takings" as compensable. This court has specifically held that it "... is established

by innumerable decisions of this court and of state and lower courts that ...a mining claim ... is property in the fullest sense of that term." (**Wilbur v. United States ex rel. Krushnic**, 280 U.S. 306, 316 (1930)). The courts fully recognize the compensability of takings and "regulatory takings," as was aggressively reaffirmed by the recent line of cases starting with the two June 1987 decisions **First Evangelical Church of Glendale v. County of Los Angeles**, 482 U.S. 384 (1987) and **Nollan v. California Coastal Commission**, 483 U.S. 825 (1987). It is clear that the United States or a state can take any property it chooses for a public use; but, "...private property may not be taken for public use without just compensation." (U.S. Const. amend. V.) So, we have the resultant critical dual reasons why mining claims should not be restricted and be taken,

i.e., these takings will cost the taxpayers many billions of dollars, and, secondly, the mineral exploration, development and productivity of the United States will be seriously hurt.

Cost #4--Non-Compensable Losses and Homelessness. Thousands of American jobs have already been lost and persons made homeless by arbitrary restrictions placed upon mineral exploration and development. Particularly hard hit are U.S. small businesses, independent family mining businesses, mineral development companies, related service and support businesses, and, of course, the thousands of future prospective mineral exploration and development businesses. Most of these private future losses of businesses, income and property will be non-compensable takings.

Absent effective and continuing mineral exploration and development the

United States will be faced with the following: Subservience to foreign sources for essential minerals; higher mineral prices; greater world-wide environmental pollution due to minimal foreign environmental controls and millions of gallons of diesel fuel used in shipping foreign minerals for ultimate consumption in the United States; billions of dollars of takings and "regulatory taking" of mining operations; decreased U.S. productivity and G.N.P.; decreased U.S. security resulting from dependence upon foreign sources for essential minerals; and an increased U.S. trade deficit resulting from buying foreign minerals while ours lie "fallow" on U.S. public lands. This country's vitality and world leadership position can only be maintained by adhering to the established public policies of encouraging and assisting mineral

exploration and development and by prohibiting the disabling practices and arbitrary actions of governmental agencies, specifically including the actions of the Forest Service in the instant Doremus case.

CONCLUSION

The Petitioners' criminal convictions, although seemingly simple and isolated, could have a profound and lasting effect upon the United States. Just as freedom of speech is chilled by each act of censorship, so the productivity of this country is quelled by acts which interfere with the citizens' rights to explore for minerals under the incentive-based Mining Law.

On behalf of those persons who choose mineral exploration and development on public land as their livelihood, including the Petitioners, the Western Mining Council respectfully requests and

implores this court to grant certiorari in this case, to provide an opportunity to clarify the validity of Forest Service practices of imposing arbitrary repressive conditions on plans of operation and of issuing unjustified criminal citations. This court should consider the strong public policy, and the specifically stated legislative policy, of encouraging mineral exploration and development on U.S. public lands.

This instant Doremus case cries out for Court direction to stop the misuse of bureaucratic devices which "chill" and destroy legitimate and desperately needed United States mineral exploration and development. This case demonstrates the need for a more detailed specification of the requirement that the Forest Service respect and encourage mineral development in the National

Forests.

The Petition for Writ of Certiorari should be granted, and the judgments and rulings below should be reversed.

Thank you for allowing the Western Mining Council to present its views and arguments on behalf of granting a writ of certiorari as requested by Petitioners Doremus in this matter.

Respectfully submitted,

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